IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No.

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner*,

v.

P. L. MILLER, *Respondent*.

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The majority opinion of the United States Circuit Court of Appeals for the Fifth Circuit, written by Holmes, Cir. J., (R. 33-36) and the dissenting opinion of Hutcheson, Cir. J., (R. 36-38) are reported at 124 F. (2d) 160, 162.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit, here sought to be reviewed, was entered December 12, 1941. (R. 39) Application for rehearing was filed December 26, 1941, (R. 40) and was denied January 2, 1942. (R. 45)

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of Febru-

ary 13, 1925 (28 U. S. C. A., Sec. 347, 43 Stat. 938); Rule 38, Sup. Ct. U. S.

STATEMENT.

The principal facts are set forth in the petition, *supra*, pp. 1-3.

SPECIFICATIONS OF ERROR.

It is submitted that the United States Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that a shipper's claim for damage to an interstate shipment, liability for which has been extinguished by operation of the provisions of the uniform bill of lading, nevertheless may be revived, and asserted by way of recoupment or otherwise, to defeat the carrier's claim for its transportation charges on such shipment.

2. In holding that the terms of the uniform bill of lading, which provide that "as a condition precedent to recovery * * * suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim * * *," may be waived and ignored.

3. In refusing to hold that the shipper's failure to institute suit for damages within the time prescribed in the bill of lading not only terminated the shipper's claim and cause of action, but extinguished the carrier's liability therefor, where the bill of lading provided that in the event of such failure "no carrier hereunder shall be liable, and such claims will not be paid."

4. In attempting to apply the Texas law of recoupment contrary to the specific provisions of the bill of lading contract as interpreted by the decisions of this Court.

5. In affirming the judgment of the District Court of the United States for the Eastern District of Texas, Sherman Division.

STATUTE INVOLVED.

The statute involved is the Interstate Commerce Act of February 4, 1887, as amended, particularly Sections 1, 2, 6 and 20(11). (49 U. S. C. A., Sections 1, 2, 6 and 20(11).)

ARGUMENT.

I.

The lower Court erred in holding that a shipper's claim for damage to an interstate shipment, liability for which has been extinguished by operation of the provisions of the uniform bill of lading, nevertheless may be revived, and asserted by way of recoupment or otherwise, to defeat the carrier's claim for its transportation charges on such shipment.

No question of fact was presented to the Circuit Court of Appeals and none is presented here. As shown by the agreed statement of facts established by the testimony, it was undisputed that the unpaid balances of the carrier's transportation charges were correctly assessed, and the fact that respondent failed to institute suit within two years and one day after the denial in writing by the carrier of his claim for damages was admitted. (R. 13-15)

Accordingly, the District Court instructed the jury as a matter of law to find for the petitioner in the full amount of the transportation charges claimed by it (R. 17-18) and further charged that "although an affirmative action upon the subject of it [respondent's claim for damages] may be barred by the statute of limitation, yet it is available to the defendant as a matter of reduction against the claim of plaintiff and only to the extent of the claim of plaintiff." (R. 20)

No question was raised in the Circuit Court of Appeals as to the sufficiency of respondent's evidence in support of his claim for damages, and the sole question then and now presented is whether a shipper may assert a claim for damages by way of recoupment in defense of a suit brought by a car-

rier to recover its transportation charges, where the shipper's claim is barred and extinguished by operation of applicable provisions of the bill of lading contract between the parties.

Section 2(b) of the bill of lading provides as follows:

> "*As a condition precedent to recovery,* claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. *Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.*" (Italics supplied)

This Court has stressed many times the necessity for uniform construction and application of the provisions of the uniform bill of lading governing interstate shipments, and has held that the interpretation of such provisions presents an important Federal question. In *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632, 636, 639, this Court said:

> "As the shipment was interstate, and the bill of lading was issued pursuant to the Federal Act, the question whether the contract thus set forth had been discharged was necessarily a Federal question. * * *
>
> * * * *
>
> "*Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a Federal question.* As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions." (Italics supplied)

See also *Chesapeake & Ohio Ry.* v. *Martin*, 283 U. S. 209, 212-213, and cases therein cited.

The right to adjudicate in the same proceeding the carrier's claim for transportation charges and the shipper's claim for damages was long the subject of opposing authorities until this Court answered the question in the affirmative in *Chicago & North Western Ry. Co.* v. *Lindell*, 281 U. S. 14, 17. After pointing out, however, that since the enactment of the Interstate Commerce Act, "carriers may not accept * * * a release of claim for damages in payment for transportation," this Court held that there was no reason why the *separate* claims could not be adjudicated in one action, saying:

> "The adjustment of defendant's demand by *counterclaim* in plaintiff's action rather than by independent suit is favored and encouraged by the law. * * *
>
> "* * * The adjudication in one suit of the *respective claims* of plaintiff and defendant is the practical equivalent of charging a judgment obtained in one action against that secured in another. Neither is to be distinguished from payment in money." (Italics supplied)

This Court thus clearly laid down the rule that claims for transportation charges and claims for damages may not be used in payment and satisfaction of each other, although independently considered, they may be adjudicated in the same proceeding. The effect of the majority opinion below, however, is to permit a claim for damages, barred and extinguished by the provisions of the bill of lading and therefore incapable of being reduced to judgment, to be used in payment of the admitted lawful claim of the carrier for its transportation charges.

The fallacy of the majority opinion below may be found in one sentence thereof, reading as follows:

> "The cited portion of the bill of lading is a limitation upon the time within which suits to enforce the recovery of claims may be instituted, *and limits the*

> *period of existence of an action for recovery against the carrier*, but is not a limitation upon a defense by way of recoupment." (Italics supplied)

In other words, the majority below find that while the shipper no longer had a cause of action against the carrier, which he could enforce and reduce to judgment, because the period of its existence had expired, he nevertheless could assert his claim by way of recoupment and use it to satisfy the carrier's claim for transportation charges.

In *Georgia, Fla. & Ala. Ry.* v. *Blish Co.*, 241 U. S. 190, this Court dealt with an earlier form of bill of lading, which similarly provided that unless claims for damage were filed in writing with the carrier within a certain time, "the carrier shall not be liable." Mr. Justice Hughes, then Associate Justice, speaking for the Court, pointed out that it was "quite as competent * * * for the parties to agree upon reasonable notice of the claim as a *condition of liability*," (p. 195) and made the following observation, which is particularly appropriate here:

> "In this view, it necessarily follows that the effect of the stipulation could not be escaped by the mere *form of the action*. The action is in trover, but as the state court said, 'if we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier.' 15 Ga. App., p. 147." (p. 197) (Italics supplied)

Respondent seems to take great comfort in the charm supposedly given to his claim by its designation as recoupment, and the majority of the Circuit Court of Appeals, contrary to the admonition of this Court above quoted, finds, in effect, that respondent's claim, admittedly having ceased to exist, had been resuscitated upon being clothed with the procedural title of recoupment. But call it what you will, whether an action in trover or a defense of recoupment, it is still "an action for damages against the * * * carrier."

II.

The lower Court erred in holding that the terms of the uniform bill of lading, which provide that "as a condition precedent to recovery * * * suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim * * *," may be waived and ignored.

The provisions of the bill of lading limiting the time within which suits for damages may be brought against the carrier and providing for the extinguishment of such claims and of the carrier's liability therefor are as much a part of the contract of carriage as the obligation of the carrier to transport and the duty of the shipper to pay the duly published legal charges therefor. As this Court many times has said, the terms of these bills of lading, which have the force of statute, may not be waived by the parties, and it is respectfully submitted that even a Court, "in equity and good conscience," as loosely suggested by the majority opinion below, may not vary the terms of such a contract.

In the *Blish* case, *supra*, (241 U. S. 190, 197) this Court said:

> "* * * But the parties *could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms* which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed." (Italics supplied)

In *Texas & Pac. Ry. Co.* v. *Leatherwood*, 250 U. S. 478, 481, Mr. Justice Brandeis, speaking for this Court, after referring to the *Blish* case, went on to point out that the provisions of the bill of lading have the force of statute, saying:

> "* * * The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and *its terms in respect to conditions of liability* are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. *Each has in effect the force of a statute,* of which all affected must take notice. That a carrier cannot be prevented by *estoppel or otherwise* from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled." (Italics supplied)

In the *Martin* case, *supra* (283 U. S. 209, 221) this Court, considering the effect of a provision in the bill of lading similar to the one here involved, held that the question was " a federal question to be determined by the application of federal law" and was unaffected by local statute or judicial determination, saying:

> "The determination by this court of that question is binding upon the state courts, and must be followed, *any state law, decision, or rule to the contrary notwithstanding.*" (Italics supplied)

Certainly, if the "conditions of liability" contained in the bill of lading, having force of a Federal Statute, may not be waived or ignored by the parties, and the carrier may not be prevented by estoppel or otherwise from insisting upon the shipper's compliance therewith, the majority of the Court below clearly erred in holding, in effect, that the carrier, by instituting its suit to recover its transportation charges, which it was required to do by the Interstate Commerce Act, could revive, by opening the door of recoupment or otherwise, the shipper's claim for damages and the carrier's liability therefor, when the claim had ceased to exist and the liability had terminated under the provisions of the bill of lading.

III.

The lower Court erred in refusing to hold that the shipper's failure to institute suit for damages within the time prescribed in the bill of lading not only terminated the shipper's claim and cause of action, but extinguished the carrier's liability therefor, where the bill of lading provided that in the event of such failure "no carrier hereunder shall be liable, and such claims will not be paid."

While the decisions of this Court above cited appear to answer the question, all doubt that failure to comply with the condition of liability provisions of the bill of lading destroys the shipper's cause of action and extinguishes the carrier's liability is dispersed by the decision of this Court in *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 667-668. In that case, an action was brought by the shipper after expiration of the time allowed by the Interstate Commerce Act, which provided that, "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after; * * *". This Court said:

> "Under such a statute the lapse of time not only bars the remedy but *destroys the liability* (*Finn* v. *United States*, 123 U. S. 227, 232) whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. * * * For when it appeared that the complaint had not been filed within the time required by the statute it was evident, *as matter of law,* that the plaintiff had *no cause of action.*" (Italics supplied)

The instant case deals with a condition, incorporated in the bill of lading pursuant to Section 20(11) of the Interstate Commerce Act and having the force of Statute, which is more specific and forceful than the limitation provision

involved in the *Phillips* case, in that after stating a definite period of limitation, it provides that upon expiration of that period, "no carrier hereunder shall be liable, and such claims will not be paid."

IV.

The lower Court erred in attempting to apply the Texas Law of recoupment contrary to the specific provisions of the bill of lading contract as interpreted by the decisions of this court.

The majority of the Court below held that, "though appellee's (respondent's) cause of action to recover affirmatively for the damages he sustained was cut off by the limitations in the bill of lading at the time this action was brought against him, his right to claim damages by way of recoupment remained," on the theory that, "the defense of recoupment * * * survives as long as the cause of action upon the (plaintiff's) claim exists."

Whether or not the majority correctly construed and applied the Texas law of recoupment, it is submitted, is unimportant. The leading State case of *Morriss-Buick Company* v. *Davis,* 127 Texas 41, 91 S. W. (2d) 313, is cited in support of their conclusion, and Hutcheson, Cir. J., in his well-reasoned dissenting opinion, correctly points out that under the rule laid down in that case, recoupment will not lie, quoting from that opinion, "where the subject matter of a defense interposed by the defendant constitutes *an independent cause of action which does not go to the foundation of the plaintiff's demand,* it cannot effect a reduction of the amount of plaintiff's recovery except by way of set-off, and the statutes of limitation are available to plaintiff in respect to such defense." (R. 38) (Emphasis supplied)

What is of importance here, however, is the fact that the opinion of the majority below, if allowed to stand, will permit the application of a rule of procedure, as variably expressed and interpreted in the several States, to abrogate the terms of the uniform bill of lading, adopted pursuant to

a Federal Statute, which has for its primary purpose the uniform regulation of interstate transportation of freight and the prevention of preferences and discriminations in connection therewith.

All of the authorities cited by the majority below deal with recoupment as applied to claims barred by *statutes* of limitation. The question here, however, does not involve a limitation fixed by statute, but a "condition of liability" fixed by contract, which this Court has held may not be waived or ignored, or emasculated by a form of action. Even the United States, though never barred by statutory limitations or laches, is held to strict compliance with the bill of lading requirement for filing claims for damages within the time therein prescribed. *United States* v. *Seaboard Air Line Ry. Co.*, 22 F. (2d) 113.

To permit the terms of the bill of lading contracts to be ignored and to require or permit shippers and carriers to follow, or purport to follow, the varying adaptations of the doctrine of recoupment by state authorities, would thwart the very purpose of the Interstate Commerce Act and would result in preferences and discriminations which the Act was designed to prevent.

As this Court said in the *Phillips* case, *supra*, (236 U. S. 662, 667):

> "* * * To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. * * *"

Carried to its extreme, the opinion of the majority below would permit a shipper to assert a claim for damages by way of recoupment in defense of the carrier's action for freight charges although a claim had never been filed with the carrier as required by the bill of lading, which this Court has found to be necessary and proper "to provide for the ascertainment of liability before the means of proof should be lost." *United States* v. *Seaboard Air Line Ry. Co., supra,* 22 F. (2d) 113, 116.

As a further example of the absurd preference and discrimination which the majority opinion below permits, a shipper who had prepaid his freight charges would be held to strict compliance with the terms of the bill of lading regarding the filing of claim and suit for damages resulting from the carrier's negligence, which would include the freight charges so paid (*Pennsylvania R. R. Co.* v. *Olivit Bros.,* 243 U. S. 574), while the shipper who had not paid his freight charges could successfully defend a suit brought by the carrier to recover its charges by alleging and proving by way of recoupment a claim for damages against the carrier, without ever having filed a claim with the carrier or without complying with the other provisions of the bill of lading with respect thereto.

The preferences and discriminations thus permitted by the opinion of the majority below would be in violation of the mandates of the Interstate Commerce Act and repugnant to the expressed intention of the Congress to provide an uniform system and standard of dealing between shippers and carriers in interstate commerce.

V.

The lower Court erred in affirming the judgment of the District Court of the United States for the Eastern District of Texas, Sherman Division.

For the reasons above set forth, the lower Court, by its majority opinion, erred in affirming the judgment of the District Court of the United States for the Eastern District of Texas, Sherman Division, and it is respectfully submitted that the writ of certiorari should be issued, as prayed.

THE PENNSYLVANIA RAILROAD COMPANY,

By FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
R. AUBREY BOGLEY,
WILLIAM F. ZEARFAUS,
JESSE F. HOLT,
Counsel for Petitioner.